

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 20, 2006

JIMMY DALE HOGAN v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Lawrence County
No. 22971 Robert L. Jones, Judge

No. M2005-01707-CCA-R3-PC - Filed April 26, 2007

The petitioner, Jimmy Dale Hogan, appeals from the trial court's denial of post-conviction relief. He was convicted of felony murder and especially aggravated robbery (Class A felony). He was sentenced to life for the felony murder conviction and to twenty years for the especially aggravated robbery conviction, to be served consecutively. In his post-conviction appeal, the petitioner contends that: counsel was ineffective both at trial and on appeal; our supreme court violated the Tennessee Constitution in denying him investigative funds; and the trial court erred in failing to instruct the jury on lesser included offenses. After careful review, we conclude that the petitioner was not denied effective assistance of counsel and that the petitioner's other issues are without merit. We affirm the post-conviction court's denial of relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Patrick G. Frogge, Nashville, Tennessee, for the appellant, Jimmy Dale Hogan.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; and T. Michel Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The underlying facts of this case, as stated by a panel of this court on direct appeal, are as follows:

At approximately 11:00 a.m. on June 19, 1992, in St. Joseph, Tennessee, the victim, Joanne Rigling, was found dead at Rigling's market where she was a cashier. She had a single, close range gunshot wound to the head. The cord to the cash register had been cut and the cash register removed.

At trial Rita Hughes testified that at approximately 10:45 a.m. she passed the market and saw the defendant. She stated she observed two people in a black, mid-size car and identified the defendant as the passenger. Additional evidence was presented by the state that at approximately 11:30 a.m. defendant was traveling at a high rate of speed about thirty miles outside of St. Joseph, when he swerved to miss a car and hit a tree. Bradford Simpson, the driver of the other vehicle, testified that defendant asked him not to call the police and removed his license plate from the vehicle he was driving, a “black, Oldsmobile-type Cutlass.” Simpson retrieved a chain, pulled defendant out of the ditch, and towed the car to defendant’s uncle’s residence.

Wilma Hogan, defendant’s aunt, testified that defendant arrived at her home after the accident and was not wearing a shirt, and his blue jeans were covered with red, dingy splatters from the knee down. She further testified defendant immediately took a shower and requested she wash his clothes.

Karen Hogan Skulkie, defendant’s ex-wife, testified that defendant disappeared for about a week after the murder. Upon his return, he told her he had been hiding out in the woods. She testified that defendant had changed his appearance and was driving a different car. Defendant then told her he was going away for awhile [sic]. When he returned the second time, he was again driving the black Cutlass he had prior to the murder. She testified that she asked the defendant at one point about the Rigling murder, and defendant said “she was better off not knowing about it.” Shulkie later gave a statement to T.B.I. agent, Don Carmen, stating defendant had confessed to robbing the market and murdering the victim. She also told Carmen defendant warned her that he would kill her if she told anyone.

Defendant made various “confessions” prior to and during his incarceration. Charles Laws, Daniel Calahan, and Chris Young all testified that defendant confessed to robbing the market and murdering the victim. In addition, Rosa Sizemore, the nurse at the Lawrence County jail, testified that defendant stated, “you think that woman in St. Joe’s got it bad; wait till I get out of there and see what I do to you.”

State v. Jimmy Dale Hogan, 2000 Tenn. Crim. App. LEXIS 393, at *2 (Tenn. Crim. App. May 19, 2000).

During the post-conviction hearing, only counsel and the defendant testified. Counsel testified that he represented the petitioner at two trials and on appeal. The first trial resulted in a hung jury, and the second trial produced the convictions. Counsel said that he had no indications that the petitioner’s mental health was an issue; therefore, he did not seek to have the petitioner evaluated. He could not recall whether he asked for instructions about lesser included offenses. He said that the jury was sequestered during the second trial. He testified that he did not seek funds for an investigator from the supreme court but said that he wished he had because he conducted the investigation on his own and found that to be difficult. He said that he devoted 270.5 hours out of

court and 28.7 hours in court working on the first trial and 154.8 hours out of court and 24 hours in court working on the second trial. He said that was the most time he had ever spent on a noncapital case. He did not recall discussing with the defendant his concerns regarding witnesses receiving money for their testimony. He testified that he did investigate whether the defendant's now-ex-wife received money for her divorce in order to overcome the marital privilege, and his investigation found that no such payment occurred. He said that, on cross-examination, he elicited testimony from one of the State's witnesses regarding a conflict between the petitioner and the witness. Counsel said his investigation determined that the petitioner's car was scrapped prior to his arrest. He said that he did not seek another composite sketch because no one provided a distinct description of another perpetrator. He believed that he discussed the petitioner's right to testify and believed that the petitioner decided not to testify because of his prior record. Counsel did not recall whether he asked the trial court to act as the thirteenth juror. He did not challenge the ballistics report because he had no reason to exclude it.

The petitioner testified that counsel and counsel's wife talked him out of testifying, but the petitioner acknowledged that it was ultimately his decision not to testify. He said that he told counsel that he was sent to a mental health center as a child for engaging in fights. He said that he gave counsel a picture of Gary Stone because he believed that the picture looked like the composite sketch of the alleged perpetrator. He believed the photo of Mr. Stone and the sketch looked identical, and he felt that he looked nothing like the sketch. He claimed that, while he was in jail for an unrelated incident, one of the State's witnesses in this case, propositioned his then-wife to perform fellatio for one hundred dollars. She said that he initiated a confrontation with the witness when he was released from jail and that the witness caused him to be charged with aggravated assault. He contends that, had counsel investigated the incident, he would have been able to raise prior arguments between the petitioner and the State's witnesses at trial. He also testified that he informed counsel that he had been told that another witness for the State had lied in his statement to the Tennessee Bureau of Investigation and that counsel failed to investigate the incident. He said he told counsel the name of the person who provided him with the information, but counsel did nothing with the information. On cross-examination, he acknowledged that the alleged lying witness did not testify during the trial in which he was convicted.

The post-conviction court denied relief to the petitioner. The court held that the lesser included offenses requested by the defendant were not available at the time of his 1997 conviction. The court held that, if there was any error committed by counsel, it would have been harmless because it did not affect the outcome of the trial. It held that no evidence was presented to support the petitioner's thirteenth juror issue. The post-conviction court found that counsel spent an enormous amount of time on the case and that he thoroughly investigated the case. The court found no evidence that an investigator would have affected the outcome of the trial. It held that the petitioner was aware of his right to testify and that he decided not to testify. Finally, the post-conviction court held that it did not have the authority to review the actions of the supreme court with regard to the denial of the petitioner's requests for funds to hire an investigator for his post-conviction.

Analysis

The petitioner has raised eight issues for our review. Initially, we note that these issues fall into three categories: 1) effective assistance of counsel; 2) trial court error; and 3) Supreme Court error. The State contends that all of the petitioner's issues are waived for failure to properly cite to the record, as required by Tennessee Rule of Criminal Procedure 10(b). The State claims that the petitioner cited to the record only four times in his argument and, further, that five of his eight issues are void of any citation to the record. Despite the omission of citations to the record, we will review the petitioner's issues that are properly before the court on their merits.

I. Effective Assistance of Counsel

The petitioner contends that the post-conviction court erred in denying his petition for relief because counsel rendered ineffective assistance of counsel, and he contends that counsel was "utterly incompetent" in its representation. The petitioner specifically argues that counsel was ineffective by: not hiring an investigator; failing to request instructions as to lesser included offenses at trial; failing to raise the trial court's omission of the jury instructions for lesser included offenses on appeal; and failing to properly advise the petitioner about his right to testify at trial. The State contends that the record supports the trial court's determination that the petitioner failed to prove his allegations by clear and convincing evidence.

In order to receive post-conviction relief based on a claim of ineffective assistance of counsel, a petitioner must demonstrate the existence of two factors: 1) trial counsel's performance was deficient; and 2) the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). Unless both prongs of this test are satisfied, a petitioner's request for relief must be denied.

The trial court's findings of fact in a post-conviction hearing carry the weight of a jury verdict and may not be reweighed or re-evaluated on appeal. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Thus, a post-conviction court's findings are conclusive on appeal unless the evidence in the record preponderates against those findings. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The court's application of the law to the facts, however, faces a de novo standard of review without any presumption of correctness. Id. To secure relief, a defendant must prove the allegations contained in his petition by clear and convincing evidence. T.C.A. § 40-30-110(f).

In order to satisfy the first prong of the test established in Strickland, a defendant must show that counsel's errors were "so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996). To do this, a defendant must establish that trial counsel's "acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Id. at 370. When reviewing counsel's performance, the petitioner is not entitled to the benefit of hindsight, and the role of the court is not to second-guess the strategy and tactics decided upon by counsel. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The second prong requires a showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, supra. The defendant must be able to prove that a reasonable probability exists that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.

Here, our review of the record supports the post-conviction court’s conclusion that counsel was effective in his representation of the petitioner. The State contends, and we agree, that there was no evidence presented to show that the hiring of a private investigator would have produced a different result. During the post-conviction hearing, the petitioner called no witnesses to support his contention that having a private investigator would have produced any additional evidence to change the outcome of the trial. Further, he has also failed to demonstrate how he was prejudiced by not having a private investigator.

Next, the petitioner failed to provide evidence to reflect that counsel was ineffective for failing to move the trial court to instruct the jury on lesser included offenses or to challenge, on appeal, the trial court’s failure to give the instructions. The post-conviction court properly noted that the lesser included offenses would not have been applicable at the time. The second jury trial resulted in the defendant’s conviction on July 31, 1997. In State v. Ely, 48 S.W.3d 701 (Tenn. 2001), our supreme court’s decision establishing second degree murder, reckless homicide, and criminally negligent homicide as lesser included offenses was not decided until 2001. Therefore, this issue is without merit.

Next, the petitioner alleged that he was denied his right to testify in violation of Momon v. State, 18 S.W.3d 152 (Tenn. 1999), and that counsel was ineffective in failing to advise the petitioner of this right. The State argues that the petitioner offers no proof for this allegation, and we agree. The petitioner testified at the post-conviction hearing that he understood he had a right to testify; in fact, he stated that he discussed with counsel his right to testify “from the git-go.” Further, though he claimed counsel and counsel’s wife persuaded him not to testify, he said, regarding this decision, “Ultimately, in the end, yes, I guess it was” his decision. Therefore, this issue is without merit.

We conclude that the petitioner has not shown that counsel’s performance was deficient or that he was prejudiced by counsel’s representation. The trial court’s dismissal of the petition for post-conviction relief was proper.

JOHN EVERETT WILLIAMS, JUDGE